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Building The Wireless Future™

March 24, 1995

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Mr. William F. Caton
Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, DC 20554

Re: *Ex Parte* Presentation
PR Docket No. 94-104

Dear Mr. Caton:

Pursuant to the Commission's *ex parte* rules, this letter serves as notice that Mr. Michael F. Altschul, Vice President and General Counsel of the Cellular Telecommunications Industry Association, sent the attached letter to Mr. Michael Wack, Deputy Chief, Policy Division of the Wireless Telecommunications Bureau. Since Mr. Altschul's letter addresses matters before the Commission in the above referenced proceeding, it should be included in the docket.

Pursuant to Section 1.1206(a)(1) of the Commission's Rules, an original and one copy of this letter are being filed with your office. If you have any questions concerning this submission, please contact the undersigned.

Sincerely,

Andrea D. Williams

Andrea D. Williams
Staff Counsel

Attachment

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Michael F. Altschul
Vice President,
General Counsel

Mr. Michael Wack
Deputy Chief, Policy Division
Wireless Telecommunications Bureau
1919 M Street, N.W., Room 644
Washington, D.C. 20554

Dear Mr. Wack:

Per your request, attached is a copy of a memorandum concerning the distinction between Sections 201(b) and 332(c)(3) of the Communications Act as they relate to a state's authority to continue rate regulation over CMRS providers. This memorandum was prepared for the Cellular Telecommunications Industry Association by its counsel, Willkie Farr & Gallagher. If you should have any questions concerning the memorandum or would like additional information on this specific issue, please feel free to contact me.

Sincerely,

Michael F. Altschul

Attachment (1)

WILLKIE FARR & GALLAGHER **MEMORANDUM**

TO: Tom Wheeler
Mike Altschul

FROM: Phil Verveer
Thomas Jones
Brian Finley

RE: Basis For Distinction Between Sections 201(b) and 332(c)(3)(A) Of The Communications Act

DATE: March 13, 1995

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You have asked us whether there are differences between the standard for regulating charges for common carrier communications services in section 201 of the Communications Act[1] and the standard for permitting state regulation of commercial mobile radio services ("CMRS") in section 332 of the Communications Act.[2] In particular, you have asked for an analysis of the distinction between the requirement that charges be "just and reasonable" under section 201(b)[3] and the requirement that a state demonstrate that "market conditions . . . fail to protect [CMRS] subscribers adequately from unjust and unreasonable rates" under section 332(c)(3)(A).[4]

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1 47 U.S.C. § 201.

2 47 U.S.C. § 332.

3 47 U.S.C. § 201(b).

4 47 U.S.C. § 332(c)(3)(A).

The fundamental difference between these two sections is that one presumes the necessity for governmental intervention in the marketplace and the other presumes against it. A party seeking relief under section 201 need only show that a specific price for common carrier service is unfair -- outside a zone of reasonableness.[5] On the other hand, a state seeking to regulate CMRS providers under section 332 must demonstrate that CMRS prices (not just a single price) are unfair, and also that market conditions cannot prevent this unfairness. The language and the legislative history of sections 332 and 201 support the view that the standard in section 332 was intended to be different and more exacting than the standard in section 201.[6] This reflects a fundamental difference in the circumstances each provision was adopted to address. Section 201 was designed to govern in the context of a monopoly provider of services;[7] section 332 was

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[5] Parties may petition the FCC for redress of violations of section 201(b) pursuant to section 208 of the Communications Act. See 47 U.S.C. § 208.

[6] The structure of section 332 also indicates that these standards were intended to be different. Section 332 explicitly requires that sections 201 and 208 of the Communications Act continue to apply to CMRS. See 47 U.S.C. § 332(c)(1)(A). The application of these sections allows any state commission to petition the FCC to remedy unfair prices. See 47 U.S.C. 201, 208. If the sections 201(b) and 332(c)(3)(A) standards were the same, a state would, strangely, be eligible for two remedies for unfair prices: FCC remedial action or the right to regulate CMRS prices within the state. Nothing in the statute or the legislative history indicates that Congress intended this result.

[7] The Senate Report accompanying its version of the 1934 Communications Act states: "This vast [telephone] monopoly which so immediately serves the needs of the people in their daily and social life must be effectively regulated." See, S. Rep. No. 781, 73rd Cong. (1934).

designed to govern in the context of multiple providers of services.

First, the terms of section 201(b) unmistakably require relief from even a single unfair charge: "all charges . . . for and in connection with such [common carrier] communication service, shall be just and reasonable, and any such charge . . . that is unjust or unreasonable is declared to be unlawful."[8] The approach follows from the context. A monopolist has the ability to limit output and increase price by definition. Market failure leads to unprotected consumers, and a presumption in favor of government intervention to secure their interests. The terms of section 332(c)(3)(A), on the other hand, permit state government intervention only where prices as a whole are unfair and market conditions cannot protect consumers from such prices:

> A State may petition the Commission for authority to regulate the rates for any commercial mobile service and the Commission shall grant such petition if such State demonstrates that --
>
> > (i) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or
> >
> > (ii) such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State.[9]

On its face, therefore, the language of these provisions demonstrates that section 332 imposes a heavier burden of proof

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[8] 47 U.S.C. § 201(b) (emphasis added).

[9] 47 U.S.C. § 332(c)(3)(A)(i)-(ii) (emphasis added).

than section 201. The approach follows from the context. In markets with multiple service providers, as is the case with CMRS, the normal presumption is that the workings of the free market will protect consumers.[10]

Furthermore, the legislative history of section 332 confirms that Congress intended that a state seeking to regulate CMRS under section 332 would have to bear a heavier burden of proof than a party seeking redress for a violation of section 201. In the case of section 332, the House Report states,

> In assessing, under clause (ii), whether market conditions in a state fail to protect subscribers of commercial mobile services adequately, the FCC shall take into account such factors as the number of such subscribers in proportion to the total population of a service area; and the number of market entrants providing such services.[11]

This undertaking far exceeds the inquiry necessary for redress under section 201.

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[10] This presumption was recognized by the Commission:

> [The Commission believes] that Congress, by adopting Section 332(c)(3)(A) of the Act, intended generally to preempt state and local rate and entry regulation of all commercial mobile radio services to ... avoid undue regulatory burdens.

Regulatory Treatment of Mobile Services, Second Report and Order in GN Docket 93-252, 9 FCC Rcd. 1411, ¶ 250 (1994).

[11] H.R. 111, 103d Cong., 1st Sess. 261 (1993). Although the House Report refers to "clause (ii)" the standard it interprets is identical to the standard found in clause (i) of the statute as passed.